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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

No._____

JOSEPH LEE LACHANCE

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS ERRED IN FAILING TO ORDER JOSEPH LEE LACHANCE'S CONVICTION IN THE TRIAL COURT WHEREIN THE TRIAL FAILED TO GRANT MR. LACHANCE A NEW AND SEPARATE TRIAL WHEN THE TRIAL JUDGE AND COUNSEL FOR A CO-DEFENDANT MADE COMMENTS CALLING THE ATTENTION OF THE JURY TO HIS FAILURE TO TESTIFY, AND WHEN A CO-DEFENDANT MADE AN OUTRAGEOUS PREJUDICIAL AND IMPROPER CLOSING ARGUMENT.

II. WHETHER THE COURT OF APPEALS ERRED IN FAILING TO REVERSE JOSEPH LEE LACHANCE'S CONVICTION IN THE TRIAL COURT WHEREIN THE TRIAL COURT IMPROPERLY ALLOWED TESTIMONY ON SEVERAL OCCASIONS THAT MR. LACHANCE HAD MADE CERTAIN HIGHLY INFLAMMATORY REMARKS WHOSE PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

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II. Whether the Court of Appeal erred in failing to reverse Joseph Lee LeChance's conviction in the Trial Court wherein the Trial Court improperly allowed testimony on several occasions that Mr. LaChance had made certain highly inflammatory remarks whose probative value was substantiall outweighed by the danger of unfair prejudice.

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OPINION BELOW

The Opinion of the Circuit Court of Appeals for the Eleventh Circuit is not yet officially reported. A copy of the Court's Opinion appears in the Appendix herein (A-1).

JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Circuit was entered on June 1, 1987, affirming the Petitioner's conviction herein. A timely request for Petition for Panel Rehearing was filed. The Court of Appeals entered its Order denying the Petition for Panel Rehearing on July 15, 1987 (Appendix B-1). This petition is filed withiin sixty days of that decision and is timely filed. The jurisdiction of the Court is invoked pursuant to 28 U.S.C., Section 1254(1) and Supreme Court Rule 21.

CONSTITUTIONAL PROVISION INVOLVED

The fundamental right to a fair trial in the United States is implicit in Article III, Section 2(3) of the United States Constitution, and the Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Mr. Joseph Lee LaChance was indicated along with seventeen (17) Co-defendents in a thirteen-count Indictment. The Indictment was centered around the criminal activities of one Co-defendent, Albert Samuel Fortna. Fortna was charged with conducting a Continuing Criminal Enterprise to import and possess with intent to distribute cocaine and marijuana.

Mr. LaChance was charged in only one court, Count II, of the thriteen-count Indictment. Count II charges Mr. LaChance with a conspiracy to import marijuana into the United States. No substantive offense was charged against Mr. LaChance and he was not charged with any cocaine violations.

The Co-defendent Fortna, the central defendent in the case, and three other Co-defendents were tried jointly with Mr. LaChance. The trial commenced on November 18, 1985 with jury selection. During opening statement, the Government concentrated their argument upon the various charges against and the extensive criminal activities of Fortna. The testimony commenced on November 20, 1985. The Government began their presentation of proof by presenting a great amount of testimony and other evidence concerning criminal activities of Fortna regarding cocaine and marijuana smuggling and possession with intent to distribute from May 1980 until June 13, 1985.

The overwhelming portion of this evidence had nothing whatsoever to do with the Count II charge against Mr. LaChance of conspiracy to import marijuana from July 1981 to September, 1982. Approximately half way through the trial, counsel for Fortna became ill and Fortna was served as a defendent in the trial (R. 582).

Prior to trial by written motion (R. 309), and throughout

the trial, Mr. LaChance repeatedly sought a severance from the other Co-defendents. Mr. LaChance also repeatedly asked for a mistrial due to the multitude of prejudicial evidence introduced at his trial.

As a result of being tried jointly with the other Co-defendents, Mr. LaChance was subjected to a great deal of improperly prejudicial statements during argument, evidence and testimony.

Specifically, Mr. LaChance moved for a severance for the following reasons.

Prejudicial statements were made during the closing arguments phase of the trial by the Trial Judge and counsel for a Co-defendant in derogation of Mr. LaChance's Fifth Amendment right to silence. The Trial Judge's pronouncement and the argument by the attorney for the Co-defendant improperly called to the jury's attention the fact that Mr. LaChance chose not to testify at trial.

The statements which substantially abridged Mr. LaChance's right to remain silent included an instruction by the Trial Judge during Co-defendant Bowles closing argument that the Co-defendant Bowles had the opportunity but chose not to testify under oath where he would have been cross-examined by the prosecutor (R. 1593). During the trial, Bowles fired his lawyer and presented his own closing. There was also statements by the Co-defendant Cepeda's attorney on closing argument that a defendant "better be clean" when they take the stand because if they're not, the Government will have a defendant on their hand (R. 1658).

Mr. LaChance chose not to testify at his trial. The Co-defendant Cepeda did take the stand and testify.

Co-defendant Bowles, in delivering his own summation, repeatedly bolstered and vouched for the truthfulness and cred-

ibility of the key Government witness Frank Kelly (R. 1595-1597).

Furthermore, on various occasions during his final argument, Bowles used inappropriate, inflammatory, improper and outrageous language (R. 1592-1593; R. 1598; R. 1604).

In presenting its case against the Co-defendants, the Government introduced a great amount of evidence to prove the crimes against the Co-defendants. This evidence did not pertain to Mr. LaChance.

The evidentiary presentation by the Government to prove the Continuing Criminal Enterprise and the other eleven counts of the Indictment not charging Mr. LaChance encompassed most of the trial. On many occasions counsel for Mr. LaChance requested a severance and a mistrial because of the improper prejudice created by the evidence introduced which in no way pertained to him (R. 404; R. 415-417; R. 463; R. 495; R. 511; R. 711-12; R. 1134; R. 1209). This unrelated testimony concerned not only conspiracies but also actual completed importations and possessions of cocaine and marijuana and threats of violence on the part of Co-defendants.

In addition, during opening statement (R. 171) and in their evidentiary presentation (R. 415; R. 464; R. 495), the Government interjected the activities of the Fortna organization in crimes not charged in the Indictment. Evidence was introduced involving uncharged conspiracies to import quaaludes and cocaine. Testimony was solicited concerning Uzi-type weapons to show the ability of the Co-defendants to do what they were charged with doing. Again, Mr. LaChance was not named as being involved with these uncharged events.

On direct examination by the Government and cross-examination by a Co-defendant, testimony was introduced that Mr. La-

Chance stated he was going to blow away or kill a Columbian (R. 661-664; R. 811).

At the conclusion of the three-week trial, Mr. LaChance was found guilty of Count II of the Indictment (R. 1709).

On January 16, 1986, Mr. LaChance was sentenced to five (5) years in federal prison and fined $15,000.00 (R. 536).

On January 16, 1986, Mr. LaChance filed a timely Notice of Appeal of his conviction with the United States Court of Appeals for the Eleventh Circuit (R. 542).

On June 1, 1987, the United States Court of Appeals for the Eleventh Circuit affirmed Mr. LaChance's conviction in a ten (10) page written opinion (See Appendix A).

On June 18, 1987, Mr. LaChance filed a timely Petition for Panel Rehearing of his affirmed conviction with the United States Court of Appeals for the Eleventh Circuit. This petition was denied by the Eleventh Circuit on July 15, 1987 (See Appendix B).

REASONS FOR GRANTING THE WRIT

I. Whether the Court of Appeals erred in failing to reverse Joseph Lee LaChance's conviction in the Trial Court wherein the trial court failed to grant Mr. LaChance a new and separate trial when the Trial Judge and counsel for a Co-defendant made comments calling the attention of the jury to his failure to testify, and when a Co-defendant made an outrageous, prejudicial and improper closing argument.

Mr. Joseph Lee LaChance was denied his constitutionally guaranteed right to a fair trial as a result of being tried jointly with four other Co-defendants in a broad, sweeping thirteen-count Indictment predicated on the alleged criminal activities of one individual, Albert Samuel Fortna.

Mr. LaChance repeatedly asked the Trial Judge for a severance from the other Co-Defendants in an effort to avoid the compelling prejudice inherent in this joint trial. The Trial Judge, however, repeatedly refused to grant Mr. LaChance a severance from the other Co-defendants.

Mr. LaChance was charged only in Count II with a conspiracy to import marijuana.

Specifiaclly, Mr. LaChance should have been granted a severance as a result of the following:

1. Prejudicial comments made during closing arguments by the Trial Judge *and* counsel for another Co-defendant which improperly brought to the jury's attention the fact that Mr. LaChance chose not to testify in derogation of Mr. LaChance's Fifth Amendment Right to Remain Silent.

2. Co-defendant Bowles, in delivering his own closing argu-

ment, improperly bolstered and vouched for the truthfulness and credibility of key government witness Frank Kelly.

3. In delivering his closing argument, Co-defendant Bowles used highly inflammatory, prejudicial and outrageous language which inevitably damaged Mr. LaChance by rousing the juror's emotions against Mr. LaChance and *and* of the Co-defendants.

In addition, the government introduced evidence of the extensive criminal activities of Fortna and the other Co-defendants. This evidence naturally and inevitably spilled over onto and prejudiced Mr. LaChance, thereby thoroughly denying him the right to be judged by his own actions instead of the cumulative actions of all of the Co-defendants.

Moreover, the government introduced evidence at trial which pertained to criminal activity of Co-defendants not charged in the Indictment and not involving Mr. LaChance.

The totality of these circumstances created a welter of confusion and prejudice which made it impossible for the jury to compartmentalize the evidence adduced at trial individually with respect to each Co-defendant.

By granting Mr. LaChance's motion for severance from the other Co-defendants, the plethora of compellingly prejudicial error that permeated Mr. LaChance's trial could have been easily avoided.

Prejudicial Comments Bringing Attention to LaChance's Failure to Take the Stand

On two separate occasions at trial, statements were made which focused the jury's attention to the fact that Mr. LaChance

exercised his constitutional right not to testify. These statements constituted reversible constitutional error in that the statements substantially abridged his right to silence, see *Griffin v. California*, 380 U.S. 609 (1965); *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962).

First, when the Trial Judge instructed the jury onthe fact that pro-se Co-defendant Bowles was going to give his own closing argument without benefit of counsel, the Trial Judge improperly stated:

> "Now I'll tell you that *he* (Co-defendant Bowles) *had an opportunity to testify under oath were he could have been cross-examined by the prosecution. He chose not to do that*, and, therefore, anything he says is not evidence in this case." (Emphasis provided) (R. 1593).

Second, counsel for Co-defendant Cepeda in his closing argument to the jury stated:

> "Now she takes the stand on her own defense, ... and I don't mind telling you, *you had better be clean up there when you take that stand because if you're not*, (United States Attorney) *Mr. Kennedy will have her in his hand.*" (Emphasis provided) (R. 1657, 1658).

The United States Constitution guarantees that no negative or adverse inferences can be drawn from a failure to testify since the threat of that inference might wrongfully compel an accused to testify. See *Carter v. Kentucky*, 450 U.S. 288, 305 (1981); *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965).

Thus, convictions should be overturned where a comment on a defendant's exercise of his right to remain silent impairs the integrity of that Fifth Amendment right. See e.g., *United States*

v. Aguiar, 610 F.2d 1296 (5th Cir. 1980); *United States v. Edwards*, 576 F.2d 1152 (5th Cir. 1978); *DeLuna v. United States*, 308 F.2d at 154 (5th Cir. 1962). For these reasons, it is a rare and exceptional case where comment on silence is permissible (See *United States v. Harp*, 513 F.2d 786, 790 (5th Cir. 1975).

Moreover, it is the references themselves that undermine a defendant's Fifth Amendment right to silence, and comments that undermine a defendant's right to silence can vitiate a conviction. It makes no difference whatsoever that the comments were made by persons other than the prosecutor, e.g., *United States v. Aguiar*, supra; *United States v. Kaplan*, 576 F.2d 598, 600 (5th Cir. 1978), or that the comments were indirect, *United States v. Aguiar*, supra; *United States v. Brown*, 546 F.2d 166, 173 (5th Cir. 1977); and *United States v. Forrest*, 620 F.2d 446 (5th Cir. 1980).

As such, oblique comments on a defendant's failure to testify, if sufficiently suggestive, *are as unlawful as direct comments* (emphasis provided). *United States v. Brown*, supra; *United States v. Harbin*, 601 F.2d 773 (5th Cir. 1979).

the key factor, therefore, in determining whether the Fifth Amendment rights of a defendant are violated when there is a comment at trial inferring to the defendant's failure to testify, is what effect the comment had on the jury—not the identity of the transgressor. See *DeLuna v. United States*, supra.

In this case, the Trial Judge's admonition to the jury that Co-defendant Bowles had an opportunity to testify under oath where he could have been cross-examined by prosecution (R. 1593) focused the juror's attention on the fear a defendant would have of being cross-examined. Just as it is improper for the prosecutor to argue from the defendant's silence, so is it improper for the trial judge to call attention to a defendant's silence. *Bruno v. United States*, 308 U.S. 287 (1939). The Trial Judge's instruction naturally

caused the jury to think of why LaChance did not testify and subject himself to cross-examination. Thus, the Trial Judge, by his instruction, used the full weight of his position as the Trial Judge to solemnize Mr. LaChance's failure to testify. This, in turn, unnecessarily drew the direct attention to the jury to the failure of a defendant to testify and be cross-examined by the prosecution.

The statements made by counsel for Co-defendant Cepeda were an equally harmful infringement upon Mr. LaChance's constitutional right to silence. A statement that "you had better be clean if you take the stand" would negatively influence the jury with regard to any Co-defendant who chose not to testify. It infers an aura of guilt for a defendant who chose not to take the stand.

A juror, hearing Cepeda's argument, would naturally wonder what it was that kept Mr. LaChance from testifying. Attention by the jury to Mr. LaChance's failure to testify would naturally result from Cepeda's argument. Such attention is inappropriate and should have been remedied by the granting of a separate trial.

The comments made at trial regarding Co-defendants Bowles and Cepeda had a substantial and prejudicial effect on Mr. LaChance's constitutionally guaranteed Fifth Amendment right to remain silent. With the guilty seed of inference having been so well planted in the jury's mind as to why Mr. LaChance did not testify, it is fair to assume that it germinated into a constitutionally unfair verdict of guilty.

Improper Argument by Co-defendant Bowles

As a result of being tried jointly with the other Co-defendants, Mr. LaChance was subjected to a great deal of improperly prejudicial statements during argument, evidence, and testimony.

On two occasions at trial, Co-defendant Bowles made im-

proper statements which prejudiced Mr. LaChance, thereby depriving Mr. LaChance of a fundamentally fair trial.

First, Co-defendant Bowles, in delivering his own summation, repeatedly bolstered and vouched for the truthfulness and credibility of key government witness, Frank Kelly (R. 1595-1597).

Second, on various occasions during his final argument, Bowles used inappropriate, inflammatory, improper and outrageous language (R. 1592-1593, 1698, 1604).

As to the fact that Co-defendant Bowles improperly vouched for the truthfulness and credibility of key government witness Frank Kelly, it is well-settled that neither the prosecutor nor defense counsel can express his opinion as to a witness's credibility. See *United States v. Risi*, 603 F.2d 1193 (5th Cir. 1979); *United States v. Morris*, 568 F.2d 396 (5th Cir. 1978). As such, any attempts to bolster a witness by vouching for his credibility are, of course, improper and error. *United States v. Morris*, supra; *United States v. Herrera*, 531 F.2d 788, 790 (5th Cir. 1976).

On three separate occasions, Co-defendant Bowles made statements to the effect that government witness Kelly "told the truth." (Tr. 1595-1597). The Government, in their brief at page 36, concede that "Bowles at times vouched for the truthfulness of (government witness) Kelly's testimony.".

When Co-defendant Bowles argued his own case before the jury in closing argument he was governed by the same rules as the prosecutor and could not vouch for the testimony of government witnesses. See *United States v. Morris*, supra; *United States v. Lamerson*, 457 F.2d 371, 372 (5th Cir. 1972). Merely because Bowles argued his own case in an improper manner does not remove the right of Mr. LaChance to a fair trial.

In addition, Co-defendant Bowles also used highly inflammatory, prejudicial and outrageous language which inevitably damaged Mr. LaChance by rousing the jurors' emotions against Mr. LaChance and *all* of the Co-defendants.

Co-defendant Bowles made the following statements which spilled over onto Mr. LaChance, and painted him with the same black brush as the criminal Bowles, thereby denying him a fair and just trial.

> **Co-defendant Bowles:** ...I don't want to be out on the streets out here *getting killed by gangsters and liars like has been on this stand today.* (Emphasis added). (R. 1592-93).

> **Co-defendant Bowles:** *These are gangsters around with guns and things* like that, get me up to another restaurant up here, set me up in front of a bunch of peopel whatnot, and then they all run off and leave me. And Mr. Kneer here is a known gangster and a dope addict. (Emphasis added). (R. 1598).

> **Co-defendant Bowles:** *I'm not looking for justice. I'm looking for you to find me not guilty.* (Emphasis added). (R. 1604).

Mere curative instructions by the Trial Court in no way remedied the fact that these statements were extremely prejudicial to Mr. LaChance in that they made it probable that the jurors' emotions against Mr. LaChance and the other Co-defendants were substantially roused to the point where the jurors' emotions, instead of the evidence against individual defendants decided the case.

ISSUE II

Whether the Court of Appeals erred in failing to reverse Joseph Lee LaChance's conviction in the Trial Court wherein the Trial Court improperly allowed testimony on several oc-

casions that Mr. LaChance had made certain highly inflammatory remarks whose probate value was substantially outweighed by the danger of unfair rejudice.

On direct examination by the Government and during cross-examination by a Co-defendant, testimony was needlessly and unfairly introduced that Mr. LaChance stated he was going to blow away or kill a Columbian (R. 661-664, 811). The probative value of this alleged statement was, at best, minimal to the Government in proving its case while the inherent thrust upon Mr. LaChance by the alleged remark was devastating.

According to *Rule* 403 of the Federal Rules of Evidence, the Trial Judge should exclude evidence, *even if the evidence is relevant* where "its probative value is substantially outweighed by the danger of unfair prejudice." See *United States v. Frick*, 588 F.2d 531, 537 (5th Cir. 1979); *United States v. Hearod*, 499 F.2d 1003, 1004 (5th Cir. 1974). Under *Rule* 403, an important consideration relating to the probative value of the evidence is the prosecutorial need for the evidence. *United States v. Spletzer*, 535 F.2d 950 (5th Cir. 1976). In this case, it is apparent that the Government in no way "needed" the alleged statement of Mr. LaChance that "he was going to kill a Columbian." This testimony, far removed from being essential or even necessary, was introduced merely to bolster the Government's tenuous case against Mr. LaChance. Mr. LaChance's alleged statement was of scant and cumulative probative force, dragged in by the government solely for the sake of its highly prejudicial effect. See *United States v. McRae*, 503 F.2d 700, (5th Cir.1979).

Another example of the total lack of prosecutorial need for Mr. LaChance's alleged statement could be found in the Government's own words. In their answer brief at page 36, the Government claimed that "at bottom, the impact (of the alleged statement) was negligible at most." Such a statement inescapably raises

the question of how then, was the probative value of such a statement so great? And how then, was the prosecutorial need for the statement so great? Mr. LaChance strongly disagrees with the Government's tody characterization of the impact of his alleged statement on the jury.

The introduction of the alleged statement by LaChance only succeeded in unfairly misleading the jury and confusing the jury. The statement only served to portray Mr. LaChance as a callous, violent man devoid of any human compassion or respect. By portraying Mr. LaChance as a cold-blooded killer in the eyes of the jury, Mr. LaChance's right to a fair trial — one decided on the evidence and not on emotion or passion — was ambushed. As such, Mr. LaChance was convicted because of the jurors' prejudicial emotions against him, instead of the actual evidence introduced at trial. As such, Mr. LaChance was substantially and unfairly prejudiced to the point where his trial and subsequent conviction were both fundamentally and constitutionally unfair.

CONCLUSION

For all the foregoing reasons, the Petitioner, JOSEPH LEE LACHANCE, respectfully moves this Court to grant the Petition for Writ of Certiorari in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing have been furnished to the Office of the United States Attorney, 500 Zack Street, 4th Floor, Tampa, Florida 33602; and MERVYN HAMBURG, ESQUIRE, Appellate Section, Criminal Division, Department of Justice, Post Office Box 899, Ben Franklin Station, Washington, D.C. 20044-0899; and to TOM McCOUN, ESQUIRE, 150 2nd Avenue North, Suite 1210, St. Petersburg, Florida 33701, by United States Mail, on this the _____ day of _____, 1987.

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Joseph Lee LaCHANCE, Sonia Luz Meza-de Cepeda, and John Thomas Bowles,
Defendants-Appellants.

No. 86-3070.

United States Court of Appeals,
Eleventh Circuit.

June 1, 1987.

Defendants were convicted of conspiring to import controlled substances and related offenses by the United States District Court, Middle District of Florida, No. 85-72-CR-T-13, George C. Carr, J., and they appealed. The Court of Appeals, Atkins, Senior District Judge, sitting by designation, held that: (1) conspiracy to import controlled substances conviction was sufficiently supported by evidence, even though defendants activities in testing plane used in smuggling operation were not illegal when viewed in isolation; (2) defense attorney's argument to jury, that defendant would take stand only if he was "clean," was not improper comment on codefendant's failure to testify; (3) denial of defendants' motion for severance was not reversible error; (4) allowing state to introduce evidence that defendant had threatened to "blow away" coconspirator was not abuse of discretion; and (5) denial of defendant's motion for hybrid representation was not abuse of discretion.

Affirmed.

1. Conspiracy 47(12)

Conspiracy to import controlled substances conviction was sufficiently supported by evidence, though defendant was not present at landing strip when marijuana was expected to arrive, where evidence was presented that defendant was present at multiple planning meetings and financed smuggling operation by providing $40,000 to lease aircraft.

2. Conspiracy 47(12)

Even though defendant's acts in testing plane used in drug smuggling operation were not illegal in isolation, his conspiracy to import controlled substances conviction was sufficiently supported by evidence that defendant was present at places where nonparticipants in smuggling venture would not have been invited, that he attended multiple planning meetings, and that he was not heard to protest his noninvolvement in illicit scheme.

3. Criminal Law 622

Persons charged together should be tried together.

4. Criminal Law 1166(6)

Defendant must demonstrate specific and compelling prejudice to justify reversal of trial court's denial of motion for severance.

5. Criminal Law 1166(6)

Denial of motion for severance results in "compelling prejudice," where jury is unable to compare and estimate independent evidence against each defendant on each count and thereupon reach individual verdicts.

See publication Words and Phrases for other judicial constructions and definitions.

6. Criminal Law 622.2(1)

Severance is not warranted where there is no reasonable basis to conclude that jury does not have capacity to follow court's cautionary instructions and to make required judgments as to guilt on each count and each defendant.

7. Criminal Law 721(3), 1171.5

Defense attorney's argument to jury in drug case involving multiple defendants, that defendant would take stand only if he was "clean," was not improper comment on codefendant's failure to take stand, but merely reference to his own client's decision

to testify; accordingly, attorney's argument was not reversible error as to codefendant, especially where trial court instructed jurors as to burden of proof on defendant's right to remain silent. U.S. C.A. Const.Amend. 5.

8. Criminal Law 1166(6)

Denial of defendants' motion for severance was not reversible error, though codefendant improperly vouched for credibility of government witness in his closing pro se argument, where trial court gave appropriate cautionary instructions, and there was no basis upon which to conclude that jurors did not understand court's instructions.

9. Criminal Law 656(7)

Trial court's instruction to jurors, that statements made by pro se defendant in his closing argument were not to be accepted as evidence since pro se defendant had chosen not to take stand, was not improper comment on defendant's or codefendant's right to remain silent. U.S.C.A. Const.Amend. 6.

10. Criminal Law 1166(6)

Denial of defendant's motion for severance was not reversible error, where trial court gave appropriate cautionary instructions, and defendant could point to nothing in record indicating that jurors were confused about evidence against him, or that they decided to hold him responsible for offenses committed by codefendants.

11. Criminal Law 338(1), 1153(1)

Evidentiary rulings are committed to broad discretion of trial court, and are subject to reversal only for abuse of discretion.

12. Criminal Law 369.2(3)

Allowing state to introduce evidence that defendant had once threatened to "blow away" fellow participant in drug smuggling conspiracy was not abuse of discretion, despite defendant's argument that he had been unfairly prejudiced thereby, where statement was admitted two weeks prior to start of jury's deliberations, did not receive special emphasis at any point in proceedings,

and was admittedly relevant to defendant's association and relationship with coconspirators. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

13. Criminal Law 641.10(3)

Right to counsel and right to proceed pro se exist in the alternative, so that defendant has no right to hybrid representation. U.S.C.A. Const.Amend. 6.

14. Criminal Law 641.10(3)

Decision to allow defendant hybrid representation rests in sound discretion of trial court. U.S.C.A. Const.Amend. 6.

15. Criminal Law 641.10(3)

When hybrid representation is denied and defendant elects to proceed pro se, it is duty of reviewing court to make sure that choice was made knowingly, intelligently, and voluntarily. U.S.C.A. Const.Amends. 6.

16. Criminal Law 1166.11(6)

Denial of defendant's motion for hybrid representation was not reversible error, where hybrid representation would have resulted in frequent, interminable pauses while defendant spoke with unofficial counsel, trial court painstakingly advised defendant of his right to attorney or to proceed pro se, and trial judge adequately assisted defendant after he elected to proceed pro se. U.S.C.A. Const.Amend. 6.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT and VANCE*, Senior District Judge.

ATKINS, Senior District Judge:

Appellants LaChance, Cepeda and Bowles appeal their convictions for conspiracy to import controlled substances and related offenses. They were indicted with fifteen co-defendants in a thir-

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

teen count indictment which focused upon the criminal activities of Albert Fortna.[1]

None of the appellants was charged with substantive offenses. LaChance and Cepeda were charged in Count II only, for conspiracy to import marijuana into the United States. Bowles was charged in Count II and III only, for the importation conspiracy and conspiracy to possess marijuana with intent to distribute it, respectively. They seek reversal on grounds that the evidence was insufficient to support the verdicts, and that the district court erred in denying their motions for severance, in admitting certain evidence, and in refusing to permit hybrid representation during closing argument. We find no error and affirm.

I. *SUFFICIENCY OF THE EVIDENCE*

Cepeda and Bowles challenge their convictions for conspiracy to import marijuana into the United States on the ground that the evidence was insufficient to support the verdicts.

A. *Cepeda's Involvement*

[1] Cepeda argues that the record shows only isolated contacts between her and members of the conspiracy, during which she was merely present and did not participate in the conspiracy. However, the evidence adduced at trial, when examined in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), supports a finding that Cepeda was not a mere bystander, but was in fact a participant in the conspiracy.

There was testimony from which the jury could find that in November 1982 Cepeda attended a conspiratorial planning meeting in Tampa and participated in the discussions at that meeting; that Cepeda and Rivas, her husband, were jointly responsible for furnishing the 22,000 pounds of marijuana that formed the subject matter of the illicit agreement; that in May 1981, Cepeda attended another meeting in Tampa wherein Rivas, Fortna, LaChance and coconspirator Martinez reviewed the importation plans; and that the next day Cepeda accompanied Rivas and Martinez on a flight to San Antonio.

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1. Fortna was named in all but one count.

Further testimony indicated that Cepeda was a contact for members of the conspiracy. Fortna called a woman named "Sonia" for information regarding a flight to Aruba and the crew's abandonment of the plane there. Martinez characterized Cepeda as "the contact in Colombia to purchase the marijuana," and co-conspirator Kelly described Cepeda's family in Colombia as the source for the marijuana.

Kelly further testified that Cepeda "was financing the operation," that she provided $40,000.00 to lease a replacement aircraft, and that, together with Rivas, she was entitled to half the marijuana load. Cepeda attended two meetings in Miami when Kelly was hired to pilot the replacement aircraft to Colombia.

Testimony also indicated that Cepeda was the contact for members of the conspiracy for information regarding the seizure of the plane and the arrest of the crew. Martinez telephoned Cepeda upon his arrival in Texas on the eve of the plane's scheduled return from Colombia, and she informed him that the others were already at the designated landing strip.[2] The day after her plane's scheduled return, Cepeda conveyed a message to Martinez from Colombia that the plane had been seized when it landed at the wrong location. Cepeda informed Kelly of the loss of the plane and the arrest of the crew in detail. She indicated that it would cost her $35,000 for each crew member's release. During this conversation, she gave Pearson $5,000.00 to lease an aircraft for a flight to Colombia.

It is well settled that participation in a conspiracy need not be proved by direct evidence; it may be inferred from the actions of the accused or by circumstantial evidence of a scheme. *United States v. Carter*, 760 F.2d 1568, 1582 (11th Cir.1985), *United States v. Cole*, 755 F.2d 748, 755 (11th Cir. 1985). The evidence of Cepeda's conduct recited above, although circumstantial, easily affords a sufficient basis for finding that she deliberately and knowingly joined and participated in the conspiracy. *See Cole*, 755 F.2d at 754.

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2. The failure of Cepeda to be present at the time that the marijuana was expected to arrive is not a circumstance that supports a hypothesis of innocence. If, as the evidence indicated, Cepeda provided the connection between the smugglers and the Colombian suppliers, her role when the airplane made its hoped-for round trip to Colombia would understandably be to remain where the Colombian exporters could make contact and keep the American-based participants aware of the airplane's progress. That responsibility could only have been carried out in Miami, Cepeda's home.

B. *Bowles' Involvement*

[2] Bowles challenges the sufficiency of the evidence supporting his conviction on Count II for conspiracy to import marijuana into the United States. He does not challenge his conviction on Count III.

Bowles' argument that the evidence shows conduct that at worst is suspicious, and that indicates mere presence or association is fatuous. The fact that his acts appeared not to be illegal when viewed in isolation does not bar his conviction. "An act innocent in nature and of no danger to the victim or society suffices if it furthers the criminal venture." *United States v. Jones*, 642 F.2d 909, 914 (5th Cir.1981). Moreover, the totality of the circumstances compels the conclusion that Bowles was a knowing participant in the importation conspiracy. *United States v. Fernandez*, 797 F.2d 943, 949 n. 3 (11th Cir.1986).

Bowles participated in organization activities in Florida, Aruba, and California that concerned aircraft intended solely for use in the effectuation of the importation plan. Testimony indicated that Bowles was brought to his first meeting in Florida by principal conspirators Fortna and LaChance. Present at that meeting was a Colombian whose express role was to guide the airplane to the marijuana pickup site in Colombia. Bowles was identified as a flight navigator. The specific details of the importation venture were discussed at that meeting. Bowles accompanied Kelly[3] to Aruba to inspect the DC-7 that had been impounded by Aruban authorities, even though he was not qualified to navigate a DC-7. The trip to Aruba was paid for by the conspirators. While in Aruba Bowles learned what was necessary to obtain access to the impounded airplane. Bowles returned to the United States with Kelly and Reece. Bowles went to California only a couple of weeks after his return to Florida and met with Hernandez, a principal conspirator who had not attended the Florida meeting. Bowles' assignment that time was to assist Kelly and Pearson in checking the airworthiness of a KC-97 tanker that the conspirators hoped to lease for their venture. Bowles went to an airport with Hernandez, Kelly and Pearson where the KC-97 was parked and examined the aircraft. Efforts to lease the KC-97 collapsed, and Bowles thereafter accompanied Kelly, Pearson, Hernandez and Fortna to another airport, where Kelly and Pearson

3. Bowles was unaware that Kelly was cooperating with law enforcement officials during this journey and thereafter.

tested a DC-7. Bowles later attended the meeting with Martinez, Fortna, Hernandez and Pearson at which Martinez revealed that Cepeda had provided $40,000 to lease the DC-7.

Bowles' conduct cannot be regarded as innocent when examined in context. Bowles was present at places where nonparticipants in the smuggling venture would have not been invited. He was not present merely on an isolated occasion; rather, he attended multiple planning meetings, and was not heard to have protested that he was not a part of the illicit scheme that was the obvious topic of discussion. *See United States v. Kincade*, 714 F.2d 1064, 1065 (11th Cir.1983). This evidence affords a sufficient basis from which the jury could infer that he heard, understood, and acquiesced in the statements. *Carter*, 760 F.2d 1568, 1579.

II. *THE DENIAL OF THE MOTION FOR SEVERANCE*

The trial of Cepeda, LaChance, and Bowles began with three others joined as defendants, William Jeske, James Harnage, and Albert Fortna. A mistrial was declared as to Fortna one week into the trial because a cancer detected in his lawyer's arm prevented his continued participation in the case. Jeske was subsequently severed before any evidence incriminating him was adduced. The trial continued to conclusion with the four remaining defendants. All three appellants argue that the district court erred in denying their motions for severance. Each sought severance on diverse grounds including a spillover effect of testimony relating to Fortna's activities, comments by counsel on the testimony of co-defendants, comments made by Bowles in his *pro se* closing argument, and the court's instructions bearing upon all of these alleged errors.

A. *Governing Principles*

[3-5] Persons charged together should be tried together. *United States v. Butler*, 792, F.2d 1528, 1534 (11th Cir.1986). However, Rule 14 of the Federal Rules of Civil Procedure provides that a court may in its discretion order a severance of defendants to avoid prejudice resulting from the joinder. *See United States v. Taylor*, 792 F.2d 1019, 1023 (11th Cir.1986). A defendant must demonstrate specific and compelling prejudice to justify reversal of a denial of severance. *United States v. Meester*, 762 F.2d 867, 883 (11th Cir.1985). The standard for determining com-

pelling prejudice is whether the jury could compare and estimate the independent evidence against each defendant on each count and thereupon reach individual verdicts. *United States v. Pirolli*, 742 F.2d 1382, 1386 (11th Cir.1984); *United States v. Garrett*, 727 F.2d 1003, 1014 (11th Cir.1984); *United States v. Phillips*, 664 F.2d 971, 1017 (5th Cir.1981).

[6] In addition, cautionary instructions limit the effect of evidence which might otherwise be prejudicial. *Meester*, 762 F.2d at 884. Where there is no reasonable basis to conclude that the jury did not have the capacity to follow these instructions and make the required judgments as to guilt on each count and each defendant, there is no basis for severance. *United States v. Rivera*, 775 F.2d 1559, 1564 (11th Cir.1985), *Meester*, 762 F.2d at 884.

When the record is considered in light of these principals, we find no error in the district court's denial of severance.

B. *Comments by Cepeda's Counsel During Final Argument*

[7] LaChance did not testify at the trial. He argues that the district court erred in refusing to grant a mistrial as to him on grounds that counsel for Cepeda, who did testify, commented upon his right to remain silent during the closing argument. Counsel for Cepeda told the jury that "you had better be clean up there when you take the stand because if you're not, Mr. Kennedy (the prosecutor) will have her in his hand." Transcript at 1658. No objection was made when the comment occurred. LaChance moved for a mistrial only after the closing charge had been given by the court and contended that the remark by counsel for Cepeda constituted a "side slap at those who have not taken the stand" and an impermissible reference to his client's failure to testify. Transcript at 1695. No other relief was thereafter requested.

In *United States v. Diecidue*, 603 F.2d 535, 553 (5th Cir.1979), the court distinguished between an adverse reference to an accused's silence by counsel for a testifying co-defendant, which is improper, and a favorable observation by that lawyer on the willingness of his own client to testify, which, we hold, is permissible. The court found no error where counsel "made no reference to the silence of other defendants but merely observed that [his own client] had told his story under oath, subject to cross-examination and before the scrutiny of the jury." *Compare DeLuna*

v. United States, 308 F.2d 140 (5th Cir.1962), in which a co-defendant's attorney's direct comment on the failure of another accused to testify constituted reversible error.

We see no significant difference between the remarks in *Diecidue* and those of Cepeda's lawyer, and we hold that the comment was not error. *See also United States v. Vera*, 701 F.2d 1349, 1362 (11th Cir.1983); *United States v. Washington*, 550 F.2d 320, 328 (5th Cir.1977); *United States v. Hodges*, 502 F.2d 586 (5th Cir.1974).

We note further that the court in its final instructions instructed the jury that the government bore the burden of proving guilt beyond a reasonable doubt. It also admonished the jury that "if a defendant elects not to testify, you should not consider this in any way during your deliberations." This language afforded LaChance the protection to which he was entitled.

C. *Comments by Bowles During Final Argument*

[8] LaChance and Cepeda argue that the district court erred in not granting a mistrial as to them on grounds that Bowles, in his *pro se* closing argument, improperly vouched for the credibility of a government witness, argued facts not in evidence, and made inflammatory comments.

The district court's diligent instruction of the jury throughout Bowles' *pro se* summation abrogated any prejudice which may have affected the co-defendants' verdicts. The court informed the jury that it had granted Bowles' request to present his own closing argument. Transcript at 1542-1543. The court emphasized that Bowles had been cautioned not to use the opportunity to testify

on his own behalf,[4] and underscored this point by instructing them that the final arguments do not constitute evidence. Transcript at 1544. At each juncture at which Bowles made an improper comment, the court interrupted him to give the jury the appropriate cautionary instruction.[5] The court's persistence, and the lack of any basis upon which to conclude that the jury could not comprehend the court's instructions, precludes a finding of compelling prejudice warranting reversal of the district court's denial of severances for LaChance and Cepeda.

1. *The Court's Instruction About Bowles' Opportunity to Testify*

[9] LaChance further argues that the court's reference to Bowles' failure to testify in an instruction given to the jury during his closing argument impermissibly commented upon LaChance's right not to testify. However, it is clear that this admonition referred to Bowles alone.

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4. The court provided Bowles with a copy of the proposed jury charge, and postponed formal discharge of Bowles' counsel until the next day so that he could discuss his summation with his attorney. The court admonished Bowles not to testify during closing argument, and warned him that if he violated this directive twice, the jury would be instructed that the comments were not evidence and that Bowles had foregone his opportunity to testify. Transcript at 1520.

5. Bowles challenged the credibility of government witness Martinez. Using the first person singular, he told the jury that he did not meet Martinez in Cepeda's presence. Once more the prosecutor objected, prompting another instruction not to consider the comment as evidence. Transcript at 1594-95. Bowles continued to argue facts not testified to by witnesses under oath. When the prosecutor objected again, the court stated that the jury assuredly understood that the comments could not be considered as evidence. Transcript at 1596. Bowles continued his argument, saying that government witness Kelly was truthful when he "said that all agents from law enforcement was liars, and the FBI was the greatest of them all." Transcript at 1597. Bowles continued discussing proof related to a different count. He told the jury about "gangsters" who carried "guns and things like that," making particular reference to prosecution witness Gilbert Knerr, whom he called "a known gangster and a dope addict." Transcript at 1598. The court held a sidebar conference. As a result, Bowles clarified this argument, telling the jury that he was referring only to Fortna and Knerr, and not to any of the co-defendants on trial. Transcript at 1602. He proceeded to the end without futher interruption, telling the jury curiously, "I'm not looking for justice. I'm looking for you to find me not guilty." Transcript at 1604.

Following two comments made by Bowles,[6] the court addressed the jury as follows:

> I have told Mr. Bowles earlier—and this is a difficult situation. This is not usual, ladies and gentlemen, and now I'll tell you that he had an opportunity to testify under oath where he could have been cross-examined by the prosecution. He chose not to do that, and therefore, anything he says is not evidence in the case. It's not sworn testimony.

Transcript at 1593.

This comment merely placed Bowles' argument in perspective by noting that its substance was not to be taken as evidence. It did not comment upon Bowles' right to remain silent or, by implication, LaChance's right to do so. *Cf. Diecidue*, 603 F.2d at 553.

D. *The Denial of Bowles' Motion for Severance*

[10] Bowles argues that his case should have been severed upon severance of that of Fortna, so that the prejudice resulting from his being tried jointly with Harnage would have been avoided. Bowles' argument rests on the premise that evidence adduced at the joint trial that related only to counts against Harnage reduced his chances of acquittal and thereby prejudiced his case.[7]

Bowles must demonstrate he suffered compelling prejudice as a result of the joint trial. *See Priolli*, 742 at 1386; *Garrett*, 727 F.2d at 1014; and *Phillips*, 664 F.2d at 1017. Specifically, he must show compelling prejudice caused by the alleged evidentiary

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6. Bowles informed the jury that he had been a pilot for 40 years, and that he had a disability. Following a cautionary instruction in which the court told the jury that the statement did not constitute evidence, Bowles continued by telling the jury that he did not care to be out in the streets "getting killed by gangsters and liars like has been on this stand today." The court admonished the jury that the argument was improper, and warned Bowles about the impropriety of his conduct. Transcript at 1592-93.

7. Bowles also incorporates by reference the arguments of LaChance and Cepeda for severance. Our reasons for affirming the denial of their severance motions applies with equal force here. *See supra*, slip opinion pp. 2862-2864, pp. _____-_____.

spillover, which effectively precluded the jury's ability to make the necessary individualized determination. *Johnson*, 713 F.2d at 640. Bowles cannot point to anything in the record indicating that the jury was confused about the evidence against him, or that the jury decided to hold him responsible for offenses committed by co-defendants. Nor can we find a basis in the record to conclude that the jury was unable to, or failed to, comply with the court's unequivocal instructions during and at the close of trial, that the jury was to consider each defendant and each count separately.

III. *THE THREAT MADE BY LACHANCE*

LaChance argues that the district court erred in admitting evidence of a statement uttered by LaChance in which he threatened that "he was going to blow away or kill" a co-conspirator. LaChance argues, as evidence of his involvement in the conspiracy, that the statement constituted cumulative evidence, and that therefore its probative value is outweighed by prejudice inherent in a remark which paints him as a "cold blooded killer."

[11] Rule 403 of the Federal Rules of Evidence provides for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of *unfair* prejudice. *Fed.R.Evid.* 403. (Emphasis added). Evidentiary rulings under Rule 403 are committed to the broad discretion of the court, and are subject to reversal only upon a showing of abuse of discretion. *Meester*, 762 F.2d at 875.

[12] LaChance does not argue with the relevance of the statement. It was probative of his knowledge of the plan, his supervisory role in court, and his association and relationship with his co-conspirators. Absent a finding of unfair prejudice, the statement would therefore be admissible. *United States v. King*, 713 F.2d 627, 631 (11th Cir.1983).

We do not find any indication of prejudice in the record. The statement did not receive special emphasis at any point in the proceedings. It was admitted two weeks prior to the start of the jury's deliberations, and was not expressly referred to again until, interestingly, counsel for the LaChance referred to it in closing argument. The record does not indicate circumstances in which the jury would be substantially influenced by the remark so as to cause

unfair prejudice to LaChance. *Meester*, 762F.2d at 876. We conclude that the district court did not abuse its discretion in admitting this evidence.

IV. *THE HYBRID REPRESENTATION CLAIM AND COMMENT BY THE COURT*

Bowles argues that the district court's refusal to permit him to retain his attorney in an advisory capacity during closing argument constituted reversible error under the Fifth and Sixth Amendments and contributed to his amateurish performance.

[13-15] It is the law of this circuit that the right to counsel and the right to proceed *pro se* exist in the alternative and the decision to permit a defendant to proceed in a hybrid fashion rests in the sound discretion of the trial court. *United States v. Mills*, 704, F.2d 1553, 1557 (11th Cir.1983); *United States v. Daniels*, 572 F.2d 535, 540 (5th Cir.1978). Where hybrid representation is denied, and the defendant elects to proceed *pro se*, it is the duty of the reviewing court to make sure that the choice was made knowingly, intelligently, and voluntarily. *United States v. Shea*, 508 F.2d 82, 86 (5th Cir.1975). In *Mills*, the defendant argued that the district court abused its discretion in failing to allow hybrid representation during the trial where the discovery phase and all pretrial hearings had been conducted with hybrid representation. He argued that the court's delayed ruling on his request to proceed with a hybrid defense encouraged him to rely on the likelihood of a hybrid defense, and that his election to proceed *pro se* deprived him of the insights he might have had had he conducted his own discovery or his attorney had been beside him at counsel table. The court held that, regardless of the tactical advantages of hybrid representation, the district court's refusal to permit it did not constitute reversible error where the court made substantial accommodations to assist the defendant in *pro se* defense.

[16] The record clearly reflects painstaking effort on the part of the court to inform Bowles of the pitfalls of self-representation, and to discourage him from doing so. The court explicitly advised both attorney and client as to the ramifications to this decision. Upon his announcement that his client wished to proceed *pro se* and retain advisory counsel, the court informed Bowles' attorney that his client's decision was tantamount to a waiver of his right to counsel and that the court would not permit Bowles to proceed *pro se* as long as he was represented by counsel. The court addressed Bowles personally after his attorney informed the court that Bowles would discharge him if hybrid representation was

not allowed and thereafter advised Bowles on more than one occasion as to the permissible limits of closing argument and the prohibition against arguing facts not in evidence. The court expressly informed Bowles that his lawyer would be discharged and unable to advise him. Transcript at 1444-1446. At the request of Bowles' counsel, the court permitted Bowles and his attorney to confer overnight and did not require Bowles to announce his final decision until the following morning. Bowles subsequently announced his decision to proceed *pro se* the next day.

Clearly, Bowles' decision to proceed *pro se* was made with full knowledge of the foolhardiness that accompanied it. The fact that the denial of hybrid representation may have contributed to, by creating the opportunity for, Bowles' amateurish performance and the court's need to give cautionary instructions does not indicate abuse of discretion in denying the request here, as the district judge adequately assisted Bowles in his *pro se* effort. It is apparent that having counsel available would have required the trial judge to subject the jury to frequent interminable pauses in the summation while Bowles spoke with unofficial counsel to receive the same advice that the court gave without protracted delays in the summation. Moreover, it has been held that where a defendant is properly permitted to appear *pro se*, his lack of legal expertise is not a basis for reversal. *United States v. Weninger*, 624 F.2d 163 (10th Cir.1980).

Bowles' final point is that the district court directly commented on his right to silence during his closing argument and therefore committed reversible error by giving the cautionary instruction also complained of by LaChance.[8]

The court simply told the jury that having elected to exercise his right not to take the stand, Bowles could not take advantage of his opportunity to make his own closing argument to introduce evidence not subject to cross-examination. Any lingering possibility that the jury might regard the court's comment as adversely reflecting upon Bowles' silence was dissipated completely by the clear admonition in the court's closing instruction that "if a defendant elects not to testify, you should not consider that in any way during your deliberations." Transcript at 1680. Accordingly, we find no basis for reversing Bowles' conviction on this ground.

WE AFFIRM.

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8. *See supra*, slip opinion p. 2865, p. _____.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-3070

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH LEE LaCHANCE
SONIA LUZ MEZA-deCEPEDA,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING
(July 15, 1987)

BEFORE: TJOFLAT and VANCE, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

The petitions for rehearing filed byf appellants Sonia Luz Meza-deCepeda and Joseph Lee LaChance, are denied.

ENTERED FOR THE COURT:

Tjoflat
United States Circuit Judge

*Hon. C. Clyde Atkins, Senior U. S. District Judge for the Southern District of Florida, sitting by designation.